1971

Ethel M. Gibbon v. Orem City Corporation, and Gary Scott Crawford : Brief of Plaintiff and Appellant

Utah Supreme Court

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THE SUPREME COURT OF THE STATE OF

EL M. GIBBONS,

aintiff and Appellant,

v.

CITY CO
GARY SCOTT

fendants and
pondents.

BRIEF OF

Appeal
of the
Honorable

J. HANSEN
ON AND
Kearns
Lake City,
torney for
d Respondents

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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Plaintiff and Appellant,	)	
	)	
v.	)	Case No.
	)	12476
OREM CITY CORPORATION,	)	
and GARY SCOTT CRAWFORD,	)	
	)	
Defendants and Respondents	)	

BRIEF OF PLAINTIFF AND APPELLANT

NATURE OF THE CASE

This is an action to recover for personal injuries suffered by plaintiff when an Orem City dump truck collided into her vehicle while she was making a left-hand turn at the intersection of State Street and 800 North in Orem City, Utah. This action was brought against

the driver of the truck, an Orem City employee driving the dump truck in the course of his employment, and against Orem City under the Utah Governmental Immunity Act Sections 63-30-1 through 63-30-34, Utah Code Annotated 1953.

DISPOSITION OF THE CASE IN TRIAL COURT

The trial court after memorandums of law were submitted and after hearing arguments granted defendants' motion for summary judgment on the ground that the evidence was conclusive as a matter of law that the plaintiff Ethel M. Gibbons was negligent and that her negligence was a proximate contributing cause of the collision and her resulting injuries.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks reversal and remand for an opportunity to present her claim upon trial to a jury.

STATEMENT OF FACTS

The statement of facts is based upon the records submitted to this court in the case of Ethel M. Gibbons v. Orem City Corporation and Gary Scott Crawford and Lynn Sorensen et al. v. Orem City and Gary Scott Crawford. Lynn Sorensen is the son of Mrs. May Sorensen, a passenger in the vehicle driven by Ethel M. Gibbons; the two cases having been consolidated for trial upon the motion of the defendants.

On October 7, 1968, Mrs. Ethel M. Gibbons was driving south on State Street in Orem City with her passenger Mrs. May Sorensen. As she approached the intersection

at 800 North, she stopped in the collecting, inside lane, preparatory to making a left turn toward Provo Canyon. When the light turned green, she proceeded into her turn. When she was approximately two-thirds of the way through the intersection, her car was struck broadside by the dump truck of defendant Orem City which was traveling in a northerly direction on State Street. The defendant's truck skidded a distance of about 61 feet before striking the Gibbons vehicle and the impact killed the passenger, May Sorensen, and seriously injured the plaintiff, demolishing her small car.

The area where the accident occurred was in a business district (R. 157). Mrs. Gibbons' car was the first one in

line waiting for the light to turn green, when it turned green, she testified that she looked to the south and to the east and saw no traffic that would endanger her (R. 141 and Dep. p. 8).

Measurements were taken by Officer Nielson and Trooper Blackhurst (R. 143, 155). From a sutdy of this information a physicist, Dr. Daniel W. Miles and Captain E. M. Pitcher, each made studies (R. 178, 171). These studies show that the dump truck was traveling north at a rate of between 40 and 48 miles per hour. Dr. Daniel W. Miles also calculated that Mrs. Gibbons' automobile was 64% through the intersection when struck by the dump truck. When Mrs. Gibbons entered the intersection, the truck was approximately 350 feet back from the intersection.

A vehicle driven by one Boyd Erickson was stopped on the opposite side of the intersection in the inside lane. The Erickson vehicle in its position obscured the dump truck, and when Mrs. Gibbons looked to the south she could not see the truck.

Defendant Crawford stated in his affidavit:

> "I do not know my speed * * * since the speedometer on the truck registers from 40 to 60 miles per hour at all times when the vehicle is in motion * * * I would guess my speed to be well within the speed limit. As I approached the intersection, the light changed from red to green in my direction, and I then looked in my rear view mirrors to ascertain if there was any traffic behind me. When I looked forward again, a Ford was moving directly into my lane of traffic making a left turn onto 8th North * * *. I applied my brakes * * * and slid into this vehicle * * * I

first detected the vehicle when I was approximately 70 to 75 feet from it * * * There were automobiles on either side of my truck and I could neither move left nor right." (R. 57).

That night at the hospital where Mrs. Gibbons was taken Mr. Crawford admitted to the witness, Wallace Larson, he had looked into "my rear view mirrors," and that "the speedometer reading in the truck was less than the actual speed of the truck." As a result of his, he stated to me that he could be in trouble for speeding. He also said to me that as he approached the intersection there was a passenger car to his left which was almost to the intersection. (R. 167, 177).

The truck skidded 61 feet 5 inches before impact, and, locked to the Gibbons

car, skidded another 28 feet 10 inches after impact. Officer Nielson stated the "overall or a total skid of the truck was 90 feet 2 inches * * *" (R. 156). Mr. Crawford told Trooper Blackhurst, "the brakes were not as good as they should have been * * *" (R. 144).

The actual course of the skidding truck and the skid marks are shown in photographs taken of the accident, and these photographs also show that Mr. Crawford would be able to see out over a passenger car such as the Erickson vehicle (R. 166, 167).

A vehicle driven by Michael S. Christensen was following plaintiff two cars to the rear. Mr. Christensen also intended to make a left hand turn.

In his affidavit he stated that he saw nothing in the intersection in the way of traffic prior to hearing the screech of the dump truck's brakes. He stated that the plaintiff was traveling from 5 to 10 miles per hour in making what he regarded as a "normal left turn" (R. 142).

The plaintiff stated in her affidavit that:

> "As I approached my left turn to go east on 8th North, I looked into the intersection. I saw no traffic or vehicles in or approaching the intersection that in my judgment would interfere with my making the left turn. I never saw the truck that hit me. My blinker signal was on for my left turn * * * I waited for the light to turn green for me, and I then made a cautious left turn feeling at the time there was no danger in the intersection * * *" (R. 141).

ARGUMENT

I

The trial court erred in granting

summary judgment on the grounds that plaintiff was contributorily negligent as a matter of law.

Rule 56(c) Utah Rules of Civil Procedure as applicable in the case at hand provides as follows:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In order for the trial court to have correctly granted summary judgment against plaintiff, there must be no genuine issues as to material facts. It is the well established rule that a summary judgment can only be granted when under the facts viewed in the light most favorable to the plaintiff, he has no right to recovery and

any doubts must be resolved in favor of permitting him to go to trial. This rule has been stated in substance in numerous Utah cases. In Welchman v. Wood, 9 Utah 2nd 25, 337 P.2d 410 (1959), the court in commenting upon when a summary judgment should be granted said:

> "Summary judgment is a drastic remedy and the Court should be reluctant to deprive litigants of an opportunity to fully present their contention upon a trial. It should be granted only when under the facts viewed in the light most favorable to the plaintiff he could not recover as a matter of law." [Emphasis added].

See also Housley v. ~~Andecon~~ ANACONDA Company, 19 Utah 2d 124, 427 P.2d 390 (1967); Control ~~led~~ Receivables, Inc. v. Harman, 17 Utah 2d 420, 413 P.2d 807 (1966); and Tangren v. Ingalls, 12 Utah 2d 388, 367 P.2d 179 (1961).

In addition to the severity of summary judgments and the reluctance of courts in granting them, it is also a well established rule that the court on appeal in reviewing such judgments will consider all of the facts presented and every inference arising therefrom in a light most favorable to the appealing party. Abdulkadir v. Western Pacific Railroad Company, 7 Utah 2d 53, 318 P.2d 339 (1957) arose out of an accident involving a speeding passenger train which struck and killed a woman crossing the railroad tracks. In addressing itself to the issue of whether the summary judgment from which the plaintiff appealed was properly granted, the court said:

> "The pertinent inquiry is whether under any view of the facts, a plaintiff could recover, It is

> acknowledged that in the face of a motion for dismissal or summary judgment, the plaintiff is entitled to have the trial court, and this court on review, consider all of the evidence which plaintiff is able to present, and every inference and intendment fairly arising therefrom in the light most favorable to him." [Emphasis added].

See also, Young v. Texas Company, 8 Utah 2nd 206, 331 P.2d 1099 (1958); Morris v. Farnsworth Motel, 123 Utah 289, 259 P.2d 297 (1953); and Auto Lease Company v. Central Mutual Insurance Company, 7 Utah 2nd 336, 325 P.2d 264 (1958).

The facts looked at in the record most favorably for the plaintiff show that the plaintiff was moving cautiously through the intersection in a left turn. She did not see the dump truck because it was about 350 feet down the road, and was obstructed by the Erickson car. The

dump truck was exceeding the speed limit and was moving between 40 and 48 miles per hour. The plaintiff was 64% through the intersection when hit by the truck. She states in her deposition that it was her intention to make a left turn; that she had her left turn signal working; when the light turned green, she looked to the east in the direction she was going to go and that she looked to the south, the direction from which the dump truck came. (Dep. 7, 9, 19. Aff. R. 141). The vehicle driven by Boyd Erickson was approaching in the innermost lane of the northbound traffic. It is ambiguous from the record whether Mrs. Gibbons saw the Erickson vehicle approaching. It is clear that she did not see the Orem City dump truck.

Mrs. Gibbons testified in her deposition as follows:

> "Question: Did you see any vehicles come into the intersection going North which might interfere with your path or the path your car was going?
>
> Answer: I did not.
>
> Question: Did you see the truck which struck your car before the collision occurred?
>
> Answer: I did not." (p. 8).

A reading of the entire record on appeal will show that Mrs. Gibbons has not been asked directly whether she saw the Erickson vehicle, but she was asked the general question of whether she saw any cars which would interfere with her making a left-hand turn:

> "Question: From the time you started your car until you had stopped for the light and the light had changed to green, from the time you started

your car, did you see any other cars in the intersection at all until the collision occurred?

Answer: I never saw any that would hinder my making the turn and going through my lane of traffic."

The affidavit of the witness Christensen states that plaintiff was moving in her left turn at the rate of 5 to 10 miles per hour. It was calculated by the physicist Miles that she was 64% through the intersection (R. 179), over 80 feet into the intersection when she was hit broadside by the dump truck. The computation was made that the dump truck was approximately 350 feet from the intersection at the time Mrs. Gibbons started her turn (R. 179). From these facts, it can be fairly inferred that when Mrs. Gibbons looked to see if any vehicles were approaching before she started her turn she

could see no vehicles approaching that would interfere with making the turn, and that she exercised that degree of care which a reasonable and prudent person would use under the circumstances. Michael S. Christensen stated in his affidavit (R. 142) that the plaintiff's car was two cars ahead of him; that he also was going to make a left-hand turn, and that:

> "I was aware that this car in the lead had a green light and saw it start and proceed into a left turn and proceed on 8th North. To the best of my recollection, this car was traveling between five and ten miles per hour as it made a left turn. I was anxious to make the same light. The next thing I remember was hearing the screech of brakes and I saw the on-coming dump truck and I knew it was going to hit the car I have above described. I saw the collision. I was unaware of any other traffic in the intersection because my attention was focused on the on-coming dump truck that I could see was surely going to hit the small car * * * This car (the plaintiff's) made a normal

left turn without incident making no impression on me until I heard the screech of the brakes as above. Prior to hearing the above screeching noise, I saw nothing in the intersection which would indicate to me that there might be an accident."

The courts have recognized that in tort actions involving issues of negligence, contributory negligence and causation, the rule of granting summary judgment only when there is no genuine issue as to material facts is even more strictly applied than in other cases such as contracts and other situations where there is greater ease in determining the factual issues. This rule was recognized in the case of Singleton v. Alexander, 19 Utah 2nd 292, 431 P.2d 126 (1967) which arose out of injuries sustained by the plaintiff in a slip and fall accident in a laundromat. In discussing the considerations involved in granting summary judgment in tort actions

the court said:

> It will be noted that a summary judgment can be granted only when it is shown that there is no genuine issue as to any material fact and that the moving party also is entitled to judgment as a matter of law under those facts. The court cannot consider the weight of testimony or the creditability of witnesses in considering a motion for summary judgment. He simply determines that there is no disputed issue of material fact and that as a matter of law, a party should prevail.
>
> "Summary judgment is more frequently given in contract cases because of greater ease in determining the factual issues. In tort claims defendants frequently rely on affirmative defenses of accord and satisfaction, res judicata, collateral estoppel, etc., and such defenses are just as easy to establish as are matters of contract. However, when it comes to determining negligence, contributory negligence, and causation, courts are not in such a good position to make a total determination for here enters a prerogative of the jury tomake a determination of its own, and that is: Did the conduct of a party measure up to that of the

reasonable prudent man, and, if not, was it a proximate cause of the harm done?"

In the Singleton case there was an issue of whether the plaintiff was guilty of contributory negligence in failing to see the water on the floor in which she slipped. In addressing itself to this issue, the court said:

"The question of contributory negligence on the part of the plaintiff is a matter for jury determination in that the jury might believe from the size of the basket the plaintiff was carrying, she would not be expected to see the floor where she was walking and especially where she had come along the path sometime prior thereto and found no impediment to her travel."

The ambiguity of the facts in the instant case; the testimony of Mrs. Gibbons in her deposition, and the affidavit of Michael S. Christensen and the inferences fairly

arising from these factual matters clearly show that there is a dispute in the facts and that the jury might find that Mrs. Gibbons, from the facts considered in the light most favorable to her, did exercise that the degree of care required of a reasonable and prudent person while making a left-hand turn.

In the Singleton v. Alexander supra., case, the court quoted 38 Am. Jur., Negligence 345:

> "The right of a party in a negligence action to have the jury pass upon the question of liability becomes absolute * * * when the proof discloses such a state of facts, whether controverted or not, that, in essaying to fix responsibility for the injury or damage, different minds may arrive reasonably at different conclusions or may disagree reasonably as to the inferences to be drawn from the facts. Thus * * * where negligence may

> reasonably and legitimately be inferred from the evidence, it is for the jury to say whether negligence shall be so inferred. * * * The inferences to be drawn from the evidence must be certain and incontrovertable to be decided by the court; otherwise they must be determined by the jury * * *"

The defendants in their memorandum to the court in support of their motion for summary judgment alleged that the plaintiff was guilty of contributory negligence in failing to yield the right of way and in failing to keep a proper lookout. In her deposition, Mrs. Gibbons stated that she did look to the south before she made her turn and saw no vehicles, which in her opinion, would interfere with her making the turn. A jury might well find this testimony establishes that she did make the necessary observations required by a reasonable

and prudent person. Defendants also allege that Mrs. Gibbons was contributorily negligent in failing to yield the right of way to the dump truck. However, it is submitted, that the dump truck was 350 feet down the street when Mrs. Gibbons looked to make her turn and that she failed to see it and failed to see how fast it was approaching because the Erickson vehicle obstructed her view. Under these circumstances, she did not fail to yield the right of way.

We submit that the instant case is a classic example of what the court in the Singleton v. Alexander, supra., case was speaking of when it stated that the court is not in as good a position to make a total determination on issues of contributory negligence, and that it is the prerogative

of the jury in considering the weight of the testimony and the creditability of witnesses to determine whether a party was, in fact, contributorily negligent. The facts of this case when viewed in the light most favorable to the plaintiff show that she was not contributorily negligent as a matter of law and the trial court erred in granting summary judgment against the plaintiff on that ground.

II

Whether plaintiff was contributorily negligent in failing to exercise the high degree of care imposed by statute upon one making a left-hand turn should be determined by the jury at trial and not on summary judgment.

41-6-73 Utah Code Annotated 1953 as amended in 1961 states:

> "A driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, during the time when such driver is moving within the intersection."

Smith v. Gallegos, 16 Utah 2nd 344, 400 P.2d 570 (1965) is the landmark case interpreting this amended statute. That case involved a similar accident occuring at 3500 South and Redwood Road in Salt Lake City, which is a four-lane highway including a left-hand turn lane. The plaintiff was in the left hand turn lane and after beginning his turn was struck by the defendant's northbound truck. The

evidence showed that the defendant had been traveling on the inside lane going northward and near the intersection he had pulled into the outside lane section to pass other cars. The court noted that as other cars on the inside lane would have been between the defendant and the plaintiff as plaintiff began his left-hand turn, the jury could reasonably regard that fact as supporting the testimony of the plaintiff that he looked and saw no on-coming traffic that presented any hazard to him in making his turn. The speed limit for the defendant was forty miles an hour, and the court found that there was evidence which could show a speed on his part of forty to forty-five miles per hour.

In holding that the trial court correctly rejected the defendant's contention

that the plaintiff should be held guilty of contributory negligence as a matter of law and properly presented the issues to the jury for determination, the court said:

> "Justice does not sanction any such favoring of one party at the expense of the other. It imposes upon all drivers, including not only the left turner * * * but also the on-coming vehicle * * * the fundamental duty which pervades the entire law of torts and from which no one is at any time excused: to use that degree of care which a reasonable and prudent person would use under the circumstances for the safety of himself and others. Notwithstanding the onerous duty now imposed on the left turner by this new statute, he is entitled to assume that other drivers will also be conforming to the requirements of law, by keeping a proper lookout and control over their cars and by using reasonable care for the safety of themselves and others. If the left turner in performing his duty, and making the required observation, sees no vehicle approaching, or that any coming is far enough away so that he can reasonably believe

that he has time to make his turn, he may proceed." [Emphasis added].

The facts of the instant case are virtually identical to those in the Smith v. Gallegos case. Mrs. Gibbons stated in her deposition that she looked south and saw no on-coming traffic which would hinder her when she commenced her turn. When she was struck by the dump truck, she was over eighty feet into the turn which was about two-thirds of the way through the intersection. If the dump truck was traveling at a speed of forty-five miles per hour, as the expert witness Miles calculated, placing it 350 feet down the road when Mrs. Gibbons commenced her turn, the Erickson vehicle would have been between Mrs. Gibbons' car and the dump truck, thus preventing her from seeing it speeding

toward the intersection. The posted speed limit for the defendant was 40 miles per hour but he was in a business district and he volunteered the statement to witness Wallace Larsen that he might be in trouble for speeding (R. 176).

Hardman v. Thurman, et al., 121 Utah 143, 239 P.2d 215 (1951) is another similar case involving a left-hand turn accident at 21st South and State Street in Salt Lake City. The plaintiff driver was going south on State Street intending to turn east onto 21st South. When the light turned green, she remained stopped momentarily to permit northbound traffic to proceed through the intersection. There was an oil tanker in the first lane east of the center of the street stopped at the south

side of the intersection signaling to make a left hand turn to the west. A car in the second lane east of the center of the street proceeding north had stopped to permit the plaintiff to proceed eastward. The plaintiff observed no cars in the third lane to the east, but as she reached that lane, a trailer truck operated by the defendant collided into the right side of the plaintiff's vehicle. There were estimated speeds of the defendant's vehicle ranging from twenty to forty-two miles per hour. The prima facie speed limit governing the defendant was forty miles per hour. The court held that the trial court was correct in denying the defendant's motion for a directed verdict on the grounds that the plaintiff was contributorily negligent

as a matter of law. The court pointed out that in crossing the first two lanes of traffic, the plaintiff might well have been unable to see the defendant's vehicle since it would have been some distance south of the intersection when she first started to turn. The court also pointed out that the oil tanker and other vehicles could have obstructed her vision and that under these circumstances, the jury could reasonably find that she had exercised due care in making the turn.

We submit that the plaintiff in the instant case is entitled to have her day in court and that indeed the facts show that a jury could find she did exercise the high degree of care imposed upon one

making a left-hand turn.

CONCLUSION

The plaintiff sustained very substantial personal injuries when two-thirds of the way through a left-hand turn her car was struck broadside by a speeding dump truck. There are critical factual issues which are in dispute. A reading of the entire record before the court in a light most favorable to the plaintiff will show that a jury could find that she did fulfill the duty imposed upon one making a left hand turn.

The trial court committed error in granting summary judgment against the plaintiff on the grounds that she was contributorily negligent as a matter of law. Plaintiff is entitled to have her

case tried before a jury and this matter should be remanded to the trial court for that purpose.

Respectfully submitted,

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